No. 13,074

IN THE

United States Court of Appeals

For the Ninth Circuit

THE COMMANDER DOOR, INC. (a corporation),

Appellant,

vs.

DUNSMUIR LUMBER CO. (a corporation),

Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

On November 6, 1950, plaintiff and appellant, Commander Door, Inc., commenced this action in the United States District Court for the Northern District of California, Northern Division (at Sacramento, California), against Dunsmuir Lumber Co., a corporation. The action was for approximately $21,000 damages for breach of contract to sell cut lumber to the plaintiff.

Jurisdiction in the United States District Court at Sacramento was had over the defendant for the reason that the plaintiff is a foreign corporation and the

defendant is a California corporation, and the amount in controversy exceeded $3,000. (28 U.S.C.A. 1332.) The fact of diversity was not questioned, nor was it an issue at the trial.

INTRODUCTORY STATEMENT.

The complaint sets forth two causes of action, the first being for damages for breach of contract as above stated, and the second count seeking return of certain freight overcharges. Judgment was rendered for the defendant on the first cause of action, and for the plaintiff on the second cause of action. The appeal is from the judgment entered in favor of defendant on the first cause of action.

The gravamen of the first cause of action is that on March 3, 1950, the parties entered into a contract for certain cut lumber; that after a portion of the lumber was shipped, the defendant breached the contract in failing and refusing to ship the balance of cut lumber sufficient to make 5350 doors; and that as a result thereof plaintiff sustained damage in the sum of $21,400.

The answer to the first cause of action admitted entering into the contract; denied that the balance of the order would amount to 5350 doors; denied plaintiff suffered any damage; alleged that defendant had the right to cease shipments because plaintiff had not paid for lumber actually shipped within certain time limits; alleged that it (defendant) did not have lumber avail-

able to ship to the plaintiff due to shortages, but also alleging that other lumber was available to plaintiff; alleged that under the terms of the contract defendant had the right to cancel any unshipped portion at any time; alleged as a further defense that as labor costs went up, defendant required, as a condition to further shipment of lumber, that the contract price be increased; and further alleged that it would have shipped cut lumber if the lumber had been available to it and if plaintiff would pay the increased charges.

The contract sued upon (Tr. 24) contains in fine print the following language:

> "It is understood and agreed that any unshipped portion of this contract may be cancelled at any time, without cost to us."

The trial court took the position (Tr. 62-65) that the above language was applicable to both parties and could not be either read out of the contract or its true meaning explained by other evidence. The court further refused plaintiff's offer to prove that by subsequent agreement of the parties the clause was eliminated from the contract.

At the trial plaintiff offered evidence to show;

(a) That said provision, if effective, was only for the benefit of the plaintiff;

(b) That the printed language above quoted was superseded and rendered inoperative by virtue of the following typewritten provision of the contract: "The prices on this order are firm."

(c) That the parties by their acts, conversations, conduct and subsequent letters had cancelled the printed clause quoted, creating a non-cancellable contract.

(d) That by virtue of the foregoing, the contract was a firm non-cancellable contract calling for the delivery and purchase of all cut lumber set forth in the contract.

STATEMENT OF THE CASE.

The plaintiff is a manufacturer of doors in Philadelphia, Pennsylvania. The defendant operates a lumber company in Dunsmuir, California.

After preliminary negotiations, plaintiff prepared and forwarded a contract (Pl. Exh. 12 for Id., Tr.. 76)[1] to the defendant company on February 17, 1950.

That contract was not satisfactory to the defendant, as it contained a provision for the adjustment of prices and was therefore not a firm order. The defendant, writing a letter to plaintiff (Exh. 13 for Id., Tr. 79), in reference to the proposed contract of February 17, 1950, stated:

> "I further discussed with you the question of price, and stated if you desire to have a firm price I would make a firm price and if lumber goes up you don't pay any more, and if the price of lumber goes down the price will be exactly the same,

[1]The pencil marking on the second page was not offered in evidence, but only the typed portion.

but I notice in your order on page 2 'The price is (sic) quoted are firm. However with (sic) general market conditions are lower, prices are to be adjusted.' *This is not my agreement with you,* if you desire to discuss prices every sixty or ninety days, I am willing to discuss the prices, but I will not stand firm on an up market and reduce on a down market, so that paragraph will have to be changed, either by having the following, 'The price is quoted firm for the year,' or 'Prices to be based upon general market conditions every sixty or ninety days' as decided upon."

* * * * * * *

"Kindly advise me at once as to your wish in the matter *as I wish to make my commitments for the year,* and if you find that you cannot handle the same, and wish to cancel the entire order, you may use your judgment, as I find that there are half a dozen different firms who are most anxious for me to manufacture for them, but I have been pleased with the association of your company *and would be pleased to continue the same for the coming year.* Please advise me at once as to your pleasure. I also note,". (Tr. 80-81; italics supplied.)

Upon receipt of that letter plaintiff prepared the contract which is the subject of this action (Pl. Exh. 1) dated March 3, 1950 (Tr. 24), in which it is stated (page 2 of the Exhibit) that "The prices on this order are firm."

Certain lumber was shipped under the contract. Thereupon a question arose as to the length of the contract and prices (Tr. 74, 84), defendant demanding

an increase in prices. Plaintiff accepted a slight increase under protest. Thereafter, beginning October 1, 1950 (Tr. 55), the defendant refused to ship any more lumber at all, unless the defendant would post a letter of credit and accept an additional increase in prices.

During the dealings between the parties letters were exchanged between them, most of these letters bearing date after March 3, 1950, the date of the contract, from which correspondence it is clear that the contract of March 3 was understood and agreed by the parties to be a binding contract at a set price for the full amount of cut lumber specified in the contract.

We refer to Exhibit 11 (for Id.), a letter from plaintiff to the defendant, dated July 25, 1950 (Tr. 74), from which we quote the following.

> "This will acknowledge receipt of your letter of the 21st and to advise that *our order with you and Dunsmuir Lumber Company was a firm order* and was not placed with you with the understanding that the prices were to be made at time of shipment;
>
> "I have just talked to Mr. Rygel and he advises that he refuses to make further shipments unless we accept a 7% increase on the stock he is furnishing. Inasmuch as we are committed to manufacture and deliver Commander Doors to our dealers based on the price of our firm order to you, we have no alternative but to say 'go ahead.' *It is my understanding after talking with Mr. Rygel that he will proceed and make shipment in accordance with the schedule with doors he is to manufacture for us.*" (Tr. 74; italics supplied.)

Again, the following quote from a letter written by Mr. Bennett on July 27, 1950 (Ex. 14 for Id., Tr. 84), an official of the defendant company, to the plaintiff, the letter being Exhibit 14:

> "With reference to this being a *firm order. My discussions with the mill and subsequent representations to you were to that effect.*" (Tr. 83; italics supplied.)

These two letters, one in reply to the other, show without doubt what the agreement of the parties was; how they understood it, and how they acted under it.

The plaintiff offered to prove from the foregoing evidence and also from conversations between the parties that both parties understood the contract to be firm both as to price and quantity for the period ending December 1, 1950. (Tr. 85.) The court, however, sustained an objection to all of this evidence and excluded the referred to exhibits on the basis of the parol evidence rule. On motion of defendant a judgment of dismissal was thereupon entered on the grounds indicated.

SPECIFICATION OF ERRORS.

(1) That the trial court erred in entering a judgment of dismissal of plaintiff's first cause of action.

(2) That the trial court erred in holding that the contract (Exhibit 1) barred a recovery by plaintiff by virtue of the parol evidence rule.

(3) That the trial court erred in refusing plaintiff's offer of proof, the offer of proof being directed

to show that the printed words on Exhibit 1, i.e., "It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us," were in fact not a part of the contract and had, by the agreement of plaintiff and defendant, been in effect deleted from the contract.

(4) That the trial court erred in holding that the language quoted in specification 3 could not be explained, and thereby rendered meaningless by the previous and subsequent acts and declarations of the parties.

(5) That the trial court erred in refusing plaintiff's offer of proof, the offer of proof being directed to show (a) that the parties understood and agreed that the order was to be a firm contract for the period involved; (b) that the parties in writing, subsequent to the date of the order (Exhibit 1), agreed that the order was firm for the period; and (c) that the original order was modified by subsequent executed oral and written agreements.

Plaintiff's offer of proof, and the evidence relied upon, is contained between pages 65 and 87 of the transcript.

ARGUMENT.

A. THE APPLICABLE CALIFORNIA STATUTES, FOR THE CONVENIENCE OF THE COURT, ARE SET OUT AS FOLLOWS:

In applying the parol evidence rule, the court puts itself in the position of the parties as of the time of contracting.

"§1647. Contracts explained by circumstances. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (*Civil Code of California.*)

"§1860. The circumstances to be considered. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." *Code of Civil Procedure of California.*

A contract in writing may be altered by a new writing or by an executed oral agreement.

"§1698. [Written contracts, how modified.] A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." *Civil Code of California.*

Oral evidence is not admissible except to show circumstances under which the contract was made, or to explain an extrinsic ambiguity.

"§1856. An agreement reduced to writing deemed the whole. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties." *Code of Civil Procedure.*

A contract is to be interpreted in the sense that the parties understood it.

"§1864. Of two constructions, which preferred. When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made." *Code of Civil Procedure.*

Written or later material in a contract or order controls any printed matter in a contract.

"§1651. Contract, partly written and partly printed. Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and

the parts which are purely original control those which are copies from a form. And if the two are absolutely repugnant, the latter must be so far disregarded." *Civil Code of California.*

B. THE LETTERS WRITTEN SUBSEQUENT TO THE DATE OF THE ORDER (PLAINTIFF'S EXHIBIT 1, TR. 24): (A) SHOW THE INTENTION OF THE PARTIES WITH RELATION TO THE WORDING OF THE ORDER; AND (B) CONSTITUTE A SUBSEQUENT WRITTEN AGREEMENT BETWEEN THE PARTIES ALTERING SUCH WORDING.

The letters referred to are Exhibit 11 for Id. (Tr. 74) and Exhibit 14 for Id. (Tr. 84.) The effect of these letters is that both parties agreed in writing that the order or contract (Exhibit 1) was a firm order not only as to price but as to quantity for the period involved. This amounts to a subsequent agreement between the parties, which evidence is admissible under the parol evidence rule.

Civil Code, §1698;

Cal. Jur. 10-Yr. Supp., p. 160;

Texas Co. v. Todd, 19 Cal. App. (2d) 174, 184-185.

The cited case involved a contract for the purchase of gasoline. Subsequent to the execution of the contract there was a discussion regarding a third type of gasoline, and prices at which it was to be sold and discounts given. There were letters and telegrams exchanged between the parties regarding the problem presented, and the court stated as follows:

"Assuming without so deciding that the contract did include the definite fixing of a discount

> of 2½ cents per gallon on third structure gasoline which was subsequently produced, we are of the opinion the telegrams and letters, which were transmitted between the parties, clearly indicate that they recognized the fact that a controversy existed between them regarding the discount to be allowed, and that they compromised that dispute and modified the contract or enlarged its terms so as to cover the omission and settle the difference by allowing a discount of 1½ cents per gallon on the third grade gasoline. The telegrams of July 8th and 9th, 1932, settled the dispute regarding that feature of the contract. That compromise agreement merged in the contract and became a part of it. There is no doubt the law authorizes such a modification or addition to a written executory contract by a written stipulation evidenced by the subsequent telegrams or letters." (Citing cases.) 19 Cal. App. (2d) at 185.

It seems clear, therefore, that even assuming the original contract was full and complete on its face, the parties modified such contract by their subsequent letters and understandings, which letters and understandings take the case out of the parol evidence rule.

C. BY THEIR ACTS AND CONDUCT THE PARTIES RECOGNIZED THE ORDER OR CONTRACT AS A FIRM ORDER FOR THE QUANTITY OF LUMBER ORDERED, AND SUCH ACTS AND CONDUCT, INCLUDING LETTERS, ARE ADMISSIBLE TO EXPLAIN THE CONTRACT.

It is clearly the law of this state that parties may place such construction upon their contract as they wish, *even though the construction placed upon it is*

contrary to the written matter contained in the contract itself.

The evidence shows in this case that a dispute arose between the parties, principally upon the matter of price, (Pl. Exh. 11 for Id., Tr. 74), that shipments under this order had been made shortly after March 3, the date of the order, to and including September 18. Prior to September 18, to wit, July 25, 1950, the date of Exhibit 11 for Id., and the reply of the defendant to that letter, the letter of Mr. Bennett, an official of the defendant company, dated July 27 (Ex. 14 for Id.), the parties discussed this dispute and showed their understanding as they construed the contract, namely, that it was firm for the period involved. This evidence, we contend, is clearly admissible and is not violative of the parol evidence rule.

Parties may construe their own contracts, and both are bound by such construction.

Cal. Jur., 10-Year Supp., p. 133.

> "* * * It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less likely to have been mistaken as to the meaning of their contract during the period when they are in harmony and practical interpretation reflects that meaning than when subsequent differences have impelled

them to resort to law and one of them then seeks an interpretation at variance with their practical interpretation of its provisions."

12 *Am. Jur.* p. 789.

"* * * 'Parties to a contract have a right to place such an interpretation upon its terms as they may see fit, *even when such an interpretation is apparently contrary to the ordinary meaning of its provisions.* It is to be assumed that they best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by them contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be.'

"The principle that parties should be bound by the construction placed upon a contract by a long course of conduct is eminently just and fair, and, we think, amply supported by the authorities." (Emphasis added.)

Loomis F. G. Assn. v. California F. Exch., 128 Cal. App. 265, 275.

"* * * Parties to a contract have a right to place such an interpretation upon its terms as they see fit, *even when such an interpretation is apparently contrary to the ordinary meaning of its provisions.* And in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed

that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty." (Emphasis added.)

Mitau v. Roddan, 149 Cal. 1, 14-15;

Texas Co. v. Todd, supra;

Rosenberg v. Moore, 194 Cal. 392, 403.

It follows, therefore, from the exchange of correspondence between the parties, that they treated the order as an order not only for the full amount of cut lumber set forth in the order, but at the definite

prices therein set forth. Not only were the acts of the parties consistent with an order for a definite time at definite prices, but the parties reduced that understanding to writing as evidenced by the above letters. Those letters are executed agreements between the parties, modifying the original order, and are consistent not only with the principle set forth in *Texas v. Todd,* supra, but also with the case of *Mitau v. Roddan,* supra, which seem to be the settled law of this state.

D. THE PRINTED LANGUAGE REFERRED TO, IF OPERATIVE AT ALL, WAS FOR THE BENEFIT OF PLAINTIFF ONLY.

As we have heretofore indicated, the first page of the order, as well as the second page of the order (Pl. Exh. 1; Tr. 24) contain the following language in very fine print:

> "It is understood and agreed that any unshipped portion of this contract may be cancelled at any time, without cost to us."

We think that quite obviously that language was placed there for the benefit of the plaintiff and was a proper reservation for the plaintiff in the conduct of its business. Otherwise the typewritten insert "The prices on this order are firm" would be entirely meaningless from a practical standpoint.

The word "us" on the printed form, if we are to apply ordinary standards of construction, could only refer to plaintiff, for the order was sent by plaintiff to the defendant company with that printed reservation on it.

As the order shows, it was accepted (lower left hand corner of Exhibit1) by the President of the defendant company, Mr. Rygel.

Actually Exhibit 1 was an order sent to the defendants for acceptance by them, with the printed reservation being a part of the order. Exhibit 1, therefore, was an offer made by plaintiff to defendant and accepted by the latter. The reservation regarding cancellation could only therefore have been intended for the benefit of the plaintiff, if reasonable standards are applied to it.

If, therefore, and we think the order clearly shows, the cancellation reservation was only for the benefit of the plaintiff and was so accepted by the defendant, the provision did not inure to the benefit of defendant, and that particular provision of the order cannot be used by defendant as a defense to an action for breach of their obligation to ship under the terms and conditions of the order.

The cancellation provision of the contract, therefore, being for the benefit of the plaintiff, it could, of course, be waived by plaintiff, and the letters heretofore referred to, namely Exhibits 11 and 14, show very clearly that that printed portion of the contract regarding cancellation was never intended to be a portion of the contract. For the letter of July 25 by plaintiff to defendant (Tr. 74) states: "Our order with you and Dunsmuir Lumber Company was a firm order," and in reply to that letter the defendant company, through Mr. Bennett, one of its directors (Exh.

14 for Id.; Tr. 84) stated: "With reference to this being a firm order my discussion with the mill and subsequent representations to you were to that effect."

Therefore, not only was the printed provision regarding cancellation for the benefit of the plaintiff, it was in effect waived by the plaintiff and the defendant through the above correspondence mentioned, which stated that both parties agreed and understood that it was a firm order as to quantity.

We respectfully submit, therefore, that the trial court improperly and erroneously excluded the evidence in plaintiff's offer of proof, which evidence has hereinabove been set forth and which evidence would show (a) that the cancellation privilege was not intended for the benefit of the defendant; (b) that the cancellation provision in the order was cancelled; and (c) that the parties agreed through subsequent writings and agreements that the order was a firm order for the quantity of lumber ordered.

Dated, San Francisco, California,
November 19, 1951.

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